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# Lemon Lives

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# LEMON LIVES

Daniel O. Conkle\*

In *Lee v. Weisman*,<sup>1</sup> the Supreme Court held that a public school could not sponsor a prayer as part of its graduation ceremony. In so ruling, the Court explicitly declined to abandon its prevailing Establishment Clause doctrine, as embodied in the test of *Lemon v. Kurtzman*.<sup>2</sup> Even so, Professor Paulsen claims that the Court in *Weisman* has effectively repudiated *Lemon*.<sup>3</sup> He argues that *Lemon* has been replaced by a test of coercion, a test that—with modifications—he strongly prefers to the *Lemon* approach. I disagree with Professor Paulsen, both normatively and descriptively. I support the basic test of *Lemon*, and I believe that it survives the *Weisman* decision.<sup>4</sup>

## I

For nearly half a century, the Supreme Court has enforced a relatively strict separation of church and state. In *Everson v. Board of Education*,<sup>5</sup> the Court ruled that the Establishment Clause of the First Amendment would be applied to state as well as federal action,<sup>6</sup> and that it would be construed to forbid not only the preferential treatment of particular religions, but also the furtherance or support of religion in general.<sup>7</sup> Over time, the doctrine announced in *Everson* evolved into the three-part test of *Lemon*.<sup>8</sup> This test

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1. 112 S. Ct. 2649 (1992).

2. 403 U.S. 602 (1971); see *Weisman*, 112 S. Ct. at 2655.

3. Michael S. Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795, 797 (1993).

4. Professor Paulsen expresses his glee with this poetic refrain: "Let the joyous word be spread, *Lemon v. Kurtzman* at last is dead!" *Id.* at 799. I hear a different chorus: "By a vote of four to five, *Lemon v. Kurtzman* is still alive."

5. 330 U.S. 1 (1947).

6. *Id.* at 15-16.

7. *Id.*

8. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (analysis of the Establishment

requires that governmental action be supported by a secular purpose, that it not have the principal or primary effect of advancing or inhibiting religion, and that it "not foster 'an excessive governmental entanglement with religion.'"<sup>9</sup> In recent years, the Court has refined the test of *Lemon* by emphasizing the "endorsement or disapproval" inquiry initially proposed by Justice O'Connor.<sup>10</sup> Under this reformulation, the critical inquiry is whether the government's action, either in actual purpose or reasonable perception, works to endorse or disapprove religious beliefs.<sup>11</sup>

Using the *Everson* doctrine and the *Lemon* test (both with and without the O'Connor modification), the Court has invalidated numerous governmental practices.<sup>12</sup> These invalidations have led to persistent charges that the Court is hostile to religion.<sup>13</sup> At the same time, however, the Court has upheld other practices that would seem to violate a stringent reading of *Everson* and *Lemon*.<sup>14</sup> One might think that this would please the Court's critics, but it does not. Rather, they use these decisions as evidence that the Court's approach is unprincipled and unworkable, if not incoherent.<sup>15</sup>

I read the Court's decisions differently. Where others see hostility to religion, I see something more complex. Where others see unworkable incoherence, I see the exercise of judgment.<sup>16</sup> I

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Clause "must begin with consideration of the cumulative criteria developed by the Court over many years").

9. *Id.* at 612-13 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

10. *See Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring).

11. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 592-94 (1989); *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

12. *See, e.g., Wallace*, 472 U.S. at 61 (invalidating a statute authorizing a moment of silence for "meditation or voluntary prayer" in public schools because its purpose was to endorse religion); *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472, 479 (1973) (invalidating a statute providing reimbursement to church-sponsored schools for costs of complying with various testing and reporting requirements).

13. *See, e.g., Wallace*, 472 U.S. at 85 (Burger, J., dissenting) (criticizing the invalidation of a moment-of-silence statute as indicating hostility toward religion).

14. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding city's inclusion of crèche in broader Christmas display); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976) (upholding noncategorical grants to church-sponsored colleges and universities).

15. Professor Paulsen sounds these familiar themes in his discussion and critique of the Court's decisions. *See Paulsen, supra* note 3, at 801 ("Not all the resulting decisions [after *Lemon*] were wrong . . . but they certainly lacked doctrinal coherence.").

16. I do not defend all of the Court's applications of *Lemon*. Especially in the area of funding for parochial education, some of the Court's decisions have turned on exceedingly fine distinctions. *See GERALD GUNTHER, CONSTITUTIONAL LAW* 1509-10 (12th ed. 1991). But even if there have been improper or inconsistent applications of the *Lemon* standard

see the Court attempting to protect the sensibilities of religious and irreligious minorities. I see the Court attempting to promote a religiously inclusive political community, not by mindlessly excluding religion from American public life, but rather by a context-specific, case-by-case analysis of particular problems.

Despite its deceptively formulaic phrasing, the *Lemon* test is not, and has never been, a talismanic rule of law. As the Court wrote in *Lemon*, "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."<sup>17</sup> Yet *Lemon* does represent a particular vision of the Establishment Clause. According to this vision, religion is valuable, but we should be suspicious of governmental attempts to support it. As the Supreme Court wrote in *Engel v. Vitale*,<sup>18</sup> "religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."<sup>19</sup> The Court explained that "a union of government and religion tends . . . to degrade religion"<sup>20</sup> and to cause people to lose respect "for any religion that ha[s] relied upon the support of government to spread its faith."<sup>21</sup> In short, governmental "support" for religion can be illusory, if not counterproductive.

Even if the governmental action does little or no good for the religion it favors, however, it is likely to harm the religious and irreligious minorities who fall outside the government's embrace. Religious or irreligious convictions often lie at the core of personal identity. Like race or ethnicity, a person's stand on religious questions can define the very essence of his or her being. When government acts to favor the religion of some of its citizens, moreover, the government itself is taking a stand. This stand reflects the government's approval of the preferred religious beliefs, but it also reflects a corresponding disapproval of competing beliefs.

To citizens whose beliefs are disapproved, the government is sending a message of disrespect. Indeed, the government's action may amount to a symbolic, but nonetheless painful, assault on their

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in particular cases, it does not follow that the standard should be abandoned altogether.

17. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). In making this comment, the Court was speaking with particular reference to the "entanglement" inquiry.

18. 370 U.S. 421 (1962).

19. *Id.* at 432 (quoting 2 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in *THE WRITINGS OF JAMES MADISON* 183, 187 (Gaillard Hunt ed., 1901)).

20. *Id.* at 431.

21. *Id.*

most fundamental sense of self. They may suffer not merely embarrassment, but even humiliation, this at the hands of their own government.<sup>22</sup> Perceiving the governmental action as an exclusionary slap in the face, they may respond in kind, distancing themselves from the political community that has done them wrong. Their loyalty may be shaken, thereby weakening the political community itself.<sup>23</sup>

Properly understood, the *Lemon* test is designed to prohibit the government from supporting religion in a manner that shows a lack of respect for religious or irreligious minorities.<sup>24</sup> But this hardly provides a categorical rule. In the first place, the government is generally free to support religion by adopting laws that embody ethical or moral standards derived from religious teachings.<sup>25</sup> Even with respect to more purely spiritual matters, moreover, the government can act to accommodate private religious activity.<sup>26</sup> Indeed, if the injury to minorities is slight and the pull of a time-honored tradition is strong, the government sometimes can go beyond accommodation to provide limited support for spiritual activities.<sup>27</sup> In each of these situations, the government's action in some sense furthers or honors particular religious beliefs, and therefore arguably shows a lack of respect for competing beliefs. Even so, there are other considerations at work: protecting societal traditions, for example, or protecting the rights of religious citizens to participate in the political process or to engage in religious practices free from

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22. See Richard S. Kay, *The Canadian Constitution and the Dangers of Establishment*, 42 DEPAUL L. REV. 361, 368 (1992) (noting the feeling of humiliation felt by a Jewish family in reaction to a Christian prayer given during a public middle school's graduation ceremony).

23. Cf. *Engel*, 370 U.S. at 431 (history suggests that when government aligns itself with a particular religion, it inevitably incurs "the hatred, disrespect and even contempt of those who [hold] contrary beliefs").

24. For a more complete explanation and defense of this interpretation of *Lemon*, see Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1172-82 (1988).

25. See Daniel O. Conkle, *Religious Purpose, Inerrancy, and the Establishment Clause*, 67 IND. L.J. 1, 5-10 (1991).

26. See Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1; Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992).

27. See Conkle, *supra* note 24, at 1183-87 (arguing, for example, that the long-sanctioned references to God in the national motto and Presidential proclamations should not be declared unconstitutional). To suggest that tradition is relevant is hardly to subscribe to the "if traditional, therefore constitutional" approach that has been advocated by Justice Scalia. See *Lee v. Weisman*, 112 S. Ct. 2649, 2678-86 (1992) (Scalia, J., dissenting).

the burden of governmental restraints.

In any given case, one or more of these competing considerations may be at work. More generally, our constitutional system values representative self-government, suggesting that the power of judicial invalidation should be exercised with caution. As a result, even outside a traditional setting, it might not be sufficient to identify *de minimis* support for religion, which might inflict *de minimis* harm on religious or irreligious minorities. All of this suggests that Establishment Clause analysis should be context-specific, and that it should include a quantitative assessment of the extent to which the government is supporting religion and thereby causing harm to minority citizens.

In its original formulation, the *Lemon* test clearly recognizes that Establishment Clause analysis is a matter of degree. Thus, the second prong of *Lemon* inquires whether the "principal or primary" effect of the government's action is to advance or inhibit religion, and the third asks whether any entanglement between religion and government is "excessive." Although the first prong appears to state more categorically that the government must have a secular purpose, this requirement has been interpreted in a manner similar to the other parts of the test. Thus, the government can act for religious as well as secular purposes as long as its religious purpose does not predominate.<sup>28</sup>

Justice O'Connor's modification focuses the Court's attention more directly on the principal harm that *Lemon* seeks to redress—the harm that religious or irreligious minorities may suffer when the government endorses, or at least appears to endorse, religious beliefs they do not share. But this does not eliminate questions of degree. Whether an impermissible endorsement is present, either in actual purpose or reasonable perception, depends on the context and on the extent to which the government's action supports the favored religion.<sup>29</sup>

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28. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 590, 593 (1987) (finding that a law violated the first prong of *Lemon* because it had a "preeminent" religious purpose and "the primary purpose . . . of advanc[ing] a particular religious belief"); *id.* at 599 (Powell, J., concurring) ("A religious purpose alone is not enough to invalidate an act of a state legislature. The religious purpose must predominate."); *Lynch v. Donnelly*, 465 U.S. 668, 681 n.6 (1984) ("Were the test that the government must have 'exclusively secular' objectives, much of the conduct and legislation this Court has approved in the past would have been invalidated.").

29. Cf. *Edwards*, 482 U.S. at 593 ("Because the primary purpose of the Creationism Act is to advance a particular religious belief, the Act endorses religion in violation of

Whatever its precise formulation, the essence of *Lemon* is a context-specific inquiry that requires the exercise of judgment. The Court must examine the government's purpose and the effect of its action, as well as the resulting relationship between religion and government. It must consider the degree to which the government is engaged in favoring or endorsing particular religious beliefs and the degree to which this action might harm religious or irreligious minorities.<sup>30</sup> *Lemon* does not provide a categorical, bright-line rule. Through its applications of *Lemon*, of course, the Supreme Court creates precedents that control the resolution of particular questions, thereby giving context-specific guidance to lower courts and to other governmental officials.<sup>31</sup> But *Lemon* itself provides no more than a general standard, or "helpful signpost,"<sup>32</sup> for evaluating Establishment Clause challenges.<sup>33</sup>

## II

Critics argue that the *Lemon* test, with or without the O'Connor modification, is unacceptable and must be replaced. One prominent alternative is a test of coercion. Under a coercion test, the Establishment Clause would not be violated unless the government's action in some way coerced religious or irreligious minorities. Noncoercive injuries would be irrelevant. In theory, such a

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the First Amendment.").

30. As the Supreme Court recognized long before it formally embraced the *Lemon* criteria, "The constitutional standard is the separation of Church and State. The problem, like many problems in constitutional law, is one of degree." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

31. As Professor Karst has noted:

No bright-line rule will do all the work that needs to be done in protecting both the value of religious freedom and the value of inclusion. During the two decades of the *Lemon* test's preeminence, the Supreme Court has given guidance not so much by the formula as by the outcomes of the cases it has decided.

Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 529 (1992).

32. *Hunt v. McNair*, 413 U.S. 734, 741 (1973).

33. As the Court has explained:

In each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed. The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause "was to state an objective, not to write a statute."

*Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

test would provide a bright-line rule for Establishment Clause cases, or at least a rule that would be far more clear than the *Lemon* standard. The government would be perfectly free to endorse or support religion, as long as it avoided the forbidden coercion. At least to this extent, critics might claim, a coercion test would be more sympathetic to religion.

Whether a coercion test in fact would be more sympathetic to religion depends upon whether religion actually profits from governmental attempts to endorse or support it. As I have suggested, the government's efforts may be unhelpful or even counterproductive.<sup>34</sup> Whether a coercion test would provide a clear rule of decision depends upon its precise formulation. Professor Paulsen's coercion test, for example, provides protection both from required participation in religious exercises and from required attendance at such exercises.<sup>35</sup> With respect to either participation or attendance, moreover, his test forbids the government not only from coercing "through direct legal sanction (or threat thereof)," but also from coercing in more subtle ways, such as by placing conditions on the receipt of benefits.<sup>36</sup>

This is hardly a bright-line rule, particularly with regard to subtle coercion. As a result, even those accepting Paulsen's statement of the test would likely differ on its proper interpretation in particular situations. In the public school context, for example, Professor Paulsen argues that teachers cannot lead their students in voluntary prayer, because students cannot opt out without forfeiting their right to maintain the privacy of their religious opinions.<sup>37</sup> One could argue that religious "released time" programs create much the same problem, but Paulsen suggests that they should be treated differently. He argues that such programs, even when conducted on the school's own premises, are not coercive as long as there are legitimate alternatives available and as long as students are required to opt in rather than out of the religious instruction.<sup>38</sup>

In the context of *Weisman* itself, Paulsen supports the Court's

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34. See *supra* notes 18-21 and accompanying text.

35. See Paulsen, *supra* note 3, at 797.

36. *Id.* (emphasis removed).

37. *Id.* at 847 (stating that because of privacy guarantees implicit in the First Amendment, it is problematic when "individuals are required by the government to identify and publicly declare their religious beliefs or lack thereof").

38. *Id.* at 853 ("[S]o long as the administration of the opt-in does not authorize teachers to direct or influence student choice, there is none of the subtle, 'raise-your-hand-and-identify-yourself' coercion involved in the school prayer context.").



result, arguing that the government cannot require attendance at a religious exercise as the condition of attending one's own graduation. But he suggests that if the prayers had been offered at the private initiative of a speaker, the result might properly have been different. In this latter situation, according to Paulsen, "government is not requiring attendance at a religious ceremony, but is requiring attendance at an event where it does not have control over the content of what a speaker says."<sup>39</sup> Likewise, Paulsen argues that public teachers are free to engage in personal religious activities on the school premises, whether in after-school meetings<sup>40</sup> or even in the classroom.<sup>41</sup> That they may serve as "role models," he writes, does not transform their religious behavior into governmental coercion.<sup>42</sup> Governmental coercion would be present, however, if teachers "use[d] their official positions to exert pressure" on students to join them.<sup>43</sup> Paulsen's analysis thus depends heavily on a distinction between private action and public responsibility. But this is a line that can be exceedingly difficult to draw, and Paulsen's coercion formula in no way requires the particular distinctions he has suggested.<sup>44</sup>

To be sure, Professor Paulsen's test is no less clear than *Lemon*, and it may even be somewhat more precise. *Lemon*, after all, is decidedly vague. And whatever the interpretive difficulties with Paulsen's test, other coercion tests might be easier to apply. Even so, clarity is not the only criterion for an acceptable doctrine of constitutional law. A gain in clarity might come at the cost of significant constitutional principles and policies. For example, the

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39. *Id.* at 838 n.155. A similar distinction might be appropriate under *Lemon*. Cf. *Lee v. Weisman*, 112 S. Ct. 2649, 2678 n.8 (1992) (Souter, J., concurring) ("If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State.").

40. Paulsen, *supra* note 3, at 849 (arguing that although the private actor and state actor roles are intertwined, the "mere fact of teacher participation in religious meetings does not constitute state compulsion to attend them").

41. *Id.* at 850 (arguing that a teacher may engage in personal religious activity in the classroom as long as the teacher's students have the ability to distinguish between the teacher's "individual expression and his or her official expression").

42. *Id.* at 849.

43. *Id.* at 850. As examples of coercive behavior by a teacher, Professor Paulsen cites speech uttered in the teacher's official capacity to a captive audience of students or a "directive instruction on what a student is to do during a 'moment of silence.'" *Id.*

44. For further elaboration of the interpretive difficulties presented by Professor Paulsen's formula, see Ira C. Lupu, *Which Old Witch: A Comment on Professor Paulsen's Lemon is Dead*, 43 CASE W. RES. L. REV. 883, 890-93 (1993).

adoption of a coercion test would sacrifice our constitutional interest in discouraging the government from inflicting noncoercive harms on religious and irreligious minorities.<sup>45</sup>

To say that we have a constitutional interest of this kind, of course, is to interpret the Constitution in a particular way, and this requires a theory of constitutional interpretation. One might take a narrow view of the Constitution, including the Establishment Clause. Professor Paulsen's analysis, for example, suggests that one should focus exclusively on the original meaning of the constitutional text.<sup>46</sup> I take a broader view. I read the Constitution more expansively, as a living, growing document. Viewed in this fashion, the Constitution is not limited to its original meaning. Rather, it can accommodate the changing texture of our society, historical and developing traditions, and evolving understandings of the principles and policies that it is read to reflect. With respect to the Establishment Clause, this kind of constitutional interpretation permits the Supreme Court to expand the original meaning of the Clause to provide broader protection against governmental attempts to support religion.

In my view, *Lemon* is preferable to a test of coercion. A test of coercion might provide an easier test, but only by divorcing the Court's analysis from various relevant factors, including the presence or absence of noncoercive injuries. Reasonable minds may differ, but I believe that the constitutional gains arising from *Lemon* outweigh the problems that *Lemon* entails, including the problem of vagueness.<sup>47</sup> Critics might charge that this preference for *Lemon* is unprincipled and indefensible. But like the application of *Lemon* in particular cases, a general preference for *Lemon*, in my

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45. See *supra* notes 17-24 and accompanying text.

46. See Paulsen, *supra* note 3, at 839-41. Elsewhere I have argued that an original-meaning approach to the Establishment Clause is severely compromised by the problem of Fourteenth Amendment incorporation. See Conkle, *supra* note 24, at 1129-45.

47. Much of the contemporary debate about the Establishment Clause derives from a jurisprudential dispute concerning the propriety of flexible standards, such as *Lemon*, as opposed to more definitive rules of decision. Compare Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 218 (1991) (suggesting that "a viable constitutional doctrine" demands "uniform rules to be expounded by courts and implemented in an across-the-board fashion") with Karst, *supra* note 31, at 529-30 (arguing that under any appropriate Establishment Clause formula, "some cases will be easy and some will be hard. The one certainty is that judges will have to exercise judgment."). See generally Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 26 (1992) (arguing that the debate about rules versus standards explains many of the current divisions on the Supreme Court).

view, is supportable as a matter of judgment.

### III

By now it should be clear that when I refer to *Lemon*, I am referring to a pragmatic test for evaluating Establishment Clause challenges. This test considers the purpose and effect of the government's action and the resulting relationship between religion and government. Whether the Court literally recites the *Lemon* formula is less important than whether it honors the policies that *Lemon* represents. The endorsement language of Justice O'Connor, for example, is fully consistent with the essence of *Lemon*. More generally, the Court's analysis and results are more important than any linguistic formula. In the sense I have in mind, "*Lemon*" refers less to a particular set of words than to a general frame of reference, a general method for evaluating Establishment Clause challenges. Indeed, one of the major differences between *Lemon* and a test of coercion is that *Lemon* requires an exercise of judgment that proponents of the coercion approach are anxious to avoid. As I have explained, this exercise of judgment involves a range of considerations, including the noncoercive injuries that governmental support for religion can inflict.<sup>48</sup>

At least on this understanding, I believe that *Lemon* survives the Supreme Court's decision in *Lee v. Weisman*.<sup>49</sup> In their concurring opinions in *Weisman*, four justices embraced some version of the *Lemon* approach,<sup>50</sup> but another four, in dissent, moved in the direction of a coercion test.<sup>51</sup> The critical opinion is that of the ninth justice, Justice Kennedy, who wrote the majority opinion in *Weisman*, speaking for himself and the four concurring justices.

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48. See *supra* notes 16-33 and accompanying text.

49. 112 S. Ct. 2649 (1992).

50. See *id.* at 2663-64 (Blackmun, J., joined by Stevens and O'Connor, JJ., concurring) (applying the basic principles of *Lemon* to the facts); *id.* at 2667 (Souter, J., joined by Stevens and O'Connor, JJ., concurring) (declining to require state coercion beyond state endorsement of religion as a necessary element of an Establishment Clause violation).

51. *Id.* at 2683-85 (Scalia, J., joined by Rehnquist, C.J., White and Thomas, JJ., dissenting). Even the dissenters suggested that they would apply a *Lemon*-like test to preclude a "sectarian" endorsement of particular religious beliefs. *Id.* at 2683-84 (Scalia, J., dissenting) (arguing that America's constitutional tradition forbids "government-sponsored endorsement of religion—even when no legal coercion is present . . . where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world, are known to differ").

Focusing on particular language in this opinion, Professor Paulsen contends that Kennedy embraced a coercion approach. I offer a different interpretation.

To apply a test of coercion, one first must identify the kinds of decisions that are protected from coercion. Under Professor Paulsen's test, for example, one is protected in deciding whether or not to attend a religious ceremony.<sup>52</sup> Second, one must determine whether the government has engaged in coercion with respect to such a decision. Under Professor Paulsen's test, this coercion can be direct or indirect; it can involve direct compulsion under force of law, or it can involve more subtle pressure. For example, the government may place individuals on the horns of a dilemma, influencing their protected decision by providing a governmental benefit only on the condition that they forego their protected choice.

Justice Kennedy's opinion, however, did not follow this kind of straightforward analysis. Although Kennedy stressed the problem of coercion, he did so in a manner suggesting that he was also concerned about noncoercive injuries. In addition, Justice Kennedy strongly emphasized the *extent* of the state's involvement in directing and sponsoring the challenged prayers.<sup>53</sup> If the test is coercion, however, the precise degree of the state's involvement with religion is not important. Either the state has coerced a protected decision or it has not.

In discussing the "fundamental limitations imposed by the Establishment Clause," Justice Kennedy wrote that "at a minimum, the Constitution guarantees that government not coerce anyone to support or participate in religion or its exercise."<sup>54</sup> But Kennedy added that government also is forbidden to "otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"<sup>55</sup> This latter statement clearly implies that there is more

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52. See *supra* notes 35-36 and accompanying text.

53. See *infra* notes 56-67 and accompanying text.

54. *Weisman*, 112 S. Ct. at 2655.

55. *Id.* (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)). Justice Kennedy had used similar language in his opinion in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), although there he had suggested that the "tending to establish" alternative would be limited to situations in which the government had provided substantial "direct benefits" to religion. See *id.* at 659 (Kennedy, J., concurring in the judgment in part and dissenting in part) ("[G]overnment may not coerce anyone to support or participate in any religion or its exercise; and it may not . . . give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'") (quoting *Lynch*, 465 U.S. at 678).

to the Establishment Clause than coercion, a conclusion amply supported by Kennedy's analysis of the case at hand.

In identifying the "dominant facts" that "mark and control the confines of our decision,"<sup>56</sup> Justice Kennedy emphasized the problem of coercion, but not before he highlighted the nature and extent of the government's involvement with the challenged prayers: "State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools."<sup>57</sup> Kennedy then devoted approximately half of his substantive analysis to a discussion of the government's involvement with religion in the case at hand and why this involvement was constitutionally problematic.

At the outset of this discussion, Justice Kennedy noted that "[t]he government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school."<sup>58</sup> "That involvement," he continued, "is as troubling as it is undeniable."<sup>59</sup> He noted that the school principal, a state official, decided that the prayers of invocation and benediction should be given and chose the clergyman who would offer them.<sup>60</sup> In addition, the principal advised the clergyman that his prayers should be nonsectarian and provided him with a pamphlet containing general guidelines for their composition. "Through these means," according to Kennedy, "the principal directed and controlled the content" of the prayers that were offered.<sup>61</sup> This violated a "cornerstone principle" of the Establishment Clause because "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."<sup>62</sup>

Justice Kennedy recognized that nonsectarian prayers may serve a valid purpose in our society, but he stated that the First Amendment does not "permit the government to undertake that task for itself."<sup>63</sup> "[T]he central meaning of the Religion Clauses of the First Amendment," he wrote, "is that all creeds must be tolerated

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56. *Weisman*, 112 S. Ct. at 2655.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 2656.

62. *Id.* (quoting *Engel v. Vitale*, 370 U.S. 421, 425 (1962)).

63. *Id.*

and none favored,"<sup>64</sup> and he found that this principle permitted no exception for a nonsectarian creed.<sup>65</sup> Kennedy noted that although nonreligious speech is fully protected even when the government participates, "[i]n religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all."<sup>66</sup> The Establishment Clause, he continued, "is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions" of the First Amendment.<sup>67</sup>

Having discussed the nature and extent of the government's involvement with religion, Justice Kennedy turned to the problem of coercion. Noting the "subtle coercive pressure" of the public school environment and the "risk of indirect coercion," he concluded that students at the graduation ceremony faced "public pressure, as well as peer pressure,"<sup>68</sup> and that these were pressures for which the government was properly held accountable.<sup>69</sup> Kennedy's "coercion" analysis, however, suggested that he actually was concerned not only about coercive injuries, but also about injuries that are better described as noncoercive.

Justice Kennedy recognized that in the context of a graduation prayer, dissenting students might be coerced in one of two ways. First, a student might object to the prayer, but feel pressure to join the prayer nonetheless, that is, to pray silently along with the rest of the group as the clergyman speaks aloud. Thus, the student might feel "that she is being forced by the State to pray in a manner her conscience will not allow."<sup>70</sup> Second, the student's conscience might require that he or she not only refuse to join the prayer, but also refuse to stand with the group, or even refuse to "maintain respectful silence."<sup>71</sup> In each of these situations, the dissenting student feels pressure to make a decision that his or her conscience does not permit. The injury suffered, therefore, can fairly be described as coercive.

Justice Kennedy also expressed concern about a different type

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64. *Id.* at 2657.

65. *See id.*

66. *Id.*

67. *Id.* at 2657-58.

68. *Id.* at 2658.

69. *See id.* at 2659 ("[T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means.").

70. *Id.* at 2658.

71. *Id.*

of injury, however, an injury that is more difficult to characterize as coercive. Some dissenters might not feel pressure to join the prayer, and they might not object to standing or maintaining silence. As Kennedy observed, "some persons who have no desire to join a prayer have little objection to standing as a sign of respect for those who do."<sup>72</sup> This kind of dissenter faces no "conflict of conscience"<sup>73</sup> in the ordinary sense, but Kennedy sees a potential injury nonetheless, especially in the context of a public school graduation. This injury flows from the risk that others might misperceive the dissenter's cooperation, viewing it not as an act of respect for those who pray, but rather as active participation, or at least approval:

There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the Rabbi's prayer . . . . What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.<sup>74</sup>

In describing "[t]he injury caused by the government's action," Kennedy mentioned not only the pressure for "participation," but also the "embarrassment" that a dissenting student might suffer.<sup>75</sup> At least in part, this embarrassment would arise from the realization that others might mistakenly believe that one had "signified" the approval of religious beliefs that he or she actually does not share.<sup>76</sup>

Justice Kennedy also described other injuries that would appear to be noncoercive. He noted that the Court must assume that "the prayers were offensive to the student and the parent who now

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72. *Id.*

73. *Id.* at 2660.

74. *Id.* at 2658. Compare *id.* at 2656 (suggesting that a dissenting student could not realistically avoid "the fact or appearance of participation") with *id.* at 2682 (Scalia, J., dissenting) (criticizing the majority for suggesting that "the dissenter's interest in avoiding even the false appearance of participation constitutionally trumps the government's interest in fostering respect for religion generally").

75. *Id.* at 2659.

76. The embarrassment arising from the false appearance of participation might extend beyond the individual dissenter. As Professor Garvey notes, a dissenter's participation in a religious exercise can become a scandal for the dissenter's co-religionists. See John H. Garvey, *Cover Your Ears*, 43 CASE W. RES. L. REV. 761, 763 (1993). Such a scandal, moreover, could arise from even the false appearance of participation.

object,"<sup>77</sup> and he argued that this offensiveness heightened "the intrusion of the religious exercise."<sup>78</sup> The nonsectarian character of the prayers, he continued, "does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront."<sup>79</sup>

To be sure, these kinds of injuries can be connected to a test of coercion. On this view, a dissenter might have no objection of conscience to standing and remaining silent during a prayer, but might nonetheless prefer to avoid the embarrassment, the offense, the affront, and the sense of isolation that might arise from the clergyman's recitation of the prayer and from the misperceptions of one's peers. As a result, the dissenter might be coerced to stay away from the graduation ceremony altogether. Conversely, because "high school graduation is one of life's most significant occasions,"<sup>80</sup> the dissenter might feel coerced to attend the ceremony nonetheless, and thereby to submit to the noncoercive injuries that Justice Kennedy has described. But under this kind of analysis, the question of coercion depends upon the prior identification of noncoercive injuries, as well as an implicit determination that such injuries are cognizable under the Establishment Clause. Otherwise, the dissenter's dilemma would not be a matter of constitutional concern. It seems that the tail is wagging the dog.

#### IV

Professor Paulsen suggests that Justice Kennedy actually adopted a test of coercion in *Weisman*, and that he rejected the more pragmatic, multi-faceted approach of *Lemon*.<sup>81</sup> On this view, Kennedy's discussion of noncoercive injuries was not only confusing, but was also gratuitous. Likewise gratuitous was Kennedy's extensive discussion of the nature and extent of the government's involvement in the prayers that were offered.

It may be that large portions of Justice Kennedy's opinion were superfluous, but there is another, more likely possibility. Kennedy clearly was concerned about coercion, but he also was

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77. *Weisman*, 112 S. Ct. at 2659.

78. *Id.*

79. *Id.* Cf. Douglas Laycock, "Noncoercive" Support for Religion: Another False Claim about the Establishment Clause, 26 VAL. U. L. REV. 37, 63 (1991) ("The attempt to be inclusive amplifies the message of exclusion to those left out.").

80. *Weisman*, 112 S. Ct. at 2659.

81. See Paulsen, *supra* note 3, at 819-21.



concerned about noncoercive governmental action and the injuries that it can cause. Rather than a test of coercion, I believe that Kennedy was applying a more pragmatic approach, an approach in the nature of a *Lemon* inquiry. In accordance with such an approach, Kennedy considered the extent to which the state had sponsored or endorsed a religious exercise by involving itself in the composition and presentation of the prayers. Under the traditional *Lemon* formula, this analysis could be tied to the first and third prongs of the test, which focus on the government's purpose and the degree of its entanglement with religion.<sup>82</sup> Consistent with the second prong of *Lemon*, Kennedy also considered the effects of the government's action, including the coercive and noncoercive effects on religious and irreligious minorities.<sup>83</sup> In addressing these effects, some of Kennedy's language was reminiscent of Justice O'Connor's alternative formulation of *Lemon*'s second prong. Although he carefully avoided the "endorsement or disapproval" language that he had previously disavowed,<sup>84</sup> Kennedy focused his attention on the "reasonable perception[s]" of a "reasonable dissenter."<sup>85</sup> In addition, Kennedy noted the "potential for divisiveness" that might arise from the government's action,<sup>86</sup> a consideration that the Court had recognized in *Lemon* as a potentially relevant factor.<sup>87</sup>

Other aspects of Justice Kennedy's opinion suggest a vision of the Establishment Clause that is closer to *Lemon* than to an approach based purely on coercion. Thus, although he regards religion as "precious"<sup>88</sup> and therefore subject to "accommodation,"<sup>89</sup> Kennedy plainly is wary of affirmative governmental efforts to support it. In part, his suspicion is linked to a concern about coercion, coupled with a belief that noncoercive governmental action may be a step in the wrong direction: "[T]he lesson of history . . . [is] that

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82. See *supra* notes 8-9 and accompanying text.

83. See *supra* notes 68-80 and accompanying text.

84. See *County of Allegheny v. ACLU*, 492 U.S. 573, 677 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

85. See *Weisman*, 112 S. Ct. at 2658; see also Paulsen, *supra* note 3, at 863 n.227 (noting the similarity between this language and the language used under Justice O'Connor's approach).

86. Kennedy focused especially on "the potential for divisiveness over the choice of a particular member of the clergy to conduct the ceremony." *Weisman*, 112 S. Ct. at 2655.

87. See *Lemon v. Kurtzman*, 403 U.S. 602, 622-24 (1971).

88. See *Weisman*, 112 S. Ct. at 2656.

89. See *id.* at 2661.

in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce."<sup>90</sup> In addition, however, Kennedy wants to protect the "purity and efficacy" of religion itself.<sup>91</sup> According to Kennedy, the Religion Clauses work to ensure this end by committing the "preservation and transmission of religious beliefs and worship . . . to the private sphere," free from the corruption of "government interference."<sup>92</sup>

Justice Kennedy's approach is both context-specific and non-categorical. He emphasizes that his opinion in *Weisman* is limited to the public school context.<sup>93</sup> More generally, he describes his approach to the Establishment Clause as one that requires considerations of degree. "Our jurisprudence in this area," he writes, "is of necessity one of line drawing, of determining at what point a dissenter's rights of religious freedom are infringed by the State."<sup>94</sup> This line drawing, he suggests, requires the Court to distinguish between inconsequential governmental involvement with religion and governmental actions that "directly or substantially involve the state in religious exercises or in the favoring of religion [so] as to have meaningful and practical impact."<sup>95</sup>

To say that Kennedy's opinion suggests a pragmatic approach in the nature of a *Lemon* inquiry is hardly to say that it advocates a strict separation of church and state. The *Lemon* test is vague and indeterminate. It permits different judges to reach different results in particular applications even as they adhere to the very same framework of analysis. In considering the purpose and effect of governmental action, as well as the government's entanglement with religion, Justice Kennedy is likely to be more permissive than many Supreme Court justices, both past and present. He might go so far as to overrule some, or perhaps even many, of the Court's prior applications of the *Lemon* test. Indeed, he might even dis-

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90. *Id.* at 2658.

91. *Id.* at 2657 (quoting 2 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in *THE WRITINGS OF JAMES MADISON* 183, 187 (Gaillard Hunt ed., 1901)).

92. *Id.* at 2656-57. Much to the dismay of Justice Scalia, Kennedy had little to say about another factor that the Court has often considered in its Establishment Clause decisionmaking — the role of societal tradition. See *id.* at 2678 (Scalia, J., dissenting) ("today's opinion . . . is conspicuously bereft of any reference to history").

93. See *id.* at 2661.

94. *Id.*

95. *Id.* (quoting *Abington School Dist. v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring)).

pense with the *Lemon* formula altogether, believing that in light of past applications, it connotes an unnecessarily rigid separation of religion and government.<sup>96</sup>

Whatever the course of his future decisionmaking, however, Justice Kennedy honored the spirit of *Lemon* in his opinion for the Court in *Lee v. Weisman*. He applied a pragmatic approach that was multi-faceted and that included both qualitative and quantitative assessments. In considering issues of purpose, effect, and entanglement, Kennedy focused not only on the harm of governmental coercion, but also on other injuries that dissenters might incur, and he noted that in the hands of government, even the favored religion might suffer.

This kind of multiple-variable, context-specific approach is the essence of *Lemon*. And so *Lemon* lives, at least in spirit, at least for now.

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96. It remains to be seen how Justice Kennedy will interpret the Establishment Clause in future cases, including those that are pending before the Supreme Court as this article goes to press. See *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 113 S. Ct. 51 (1992), *granting cert. to* 959 F.2d 381 (2d Cir. 1992); *Zobrest v. Catalina Foothills School Dist.*, 113 S. Ct. 52 (1992), *granting cert. to* 963 F.2d 1190 (9th Cir. 1992). Speaking for the majority in *Weisman*, Justice Kennedy explicitly declined to reconsider *Lemon*. *Weisman*, 112 S. Ct. at 2655; see also *supra* note 2 and accompanying text. Even so, Kennedy did not reaffirm or rely upon the *Lemon* formula as such. Further, in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), Justice Kennedy implied that he might be prepared to dispense with the *Lemon* test and some of the precedents that have arisen from its application. See *id.* at 655-79 (Kennedy, J., concurring in the judgment in part and dissenting in part). More recently, however, in a decision announced less than a week after *Weisman*, Kennedy has emphasized the importance of *stare decisis*. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2808-16 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.); see Ronald C. Kahn, *God Save Us From The Coercion Test: Constitutive Decision-Making, Polity Principles, and Religious Freedom*, 43 CASE W. RES. L. REV. 983, 1009 (1993) (suggesting that Kennedy's opinion in *Casey* might have implications for his decisionmaking under the Establishment Clause).